HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

RSA No.: 26 of 1997
Reserved on: 14.12.2007
Decided on: 17.12.2007

Gita Ram and another .....Appellants.

Versus

Data Ram and others. .....Respondents.

Coram:

The Hon'ble Mr.Justice V.K. Ahuja, Judge.

Whether approved for reporting? Yes.

For the appellants: Mr.Bimal Gupta, Advocate.

For the respondents: Mr.K.D. Sood, Advocate.

V.K. Ahuja, J:

This is a regular second appeal filed by the appellant against the judgment and decree of the court of learned District Judge, Sirmour, dated 30.12.1996, vide which the appeal filed by the appellant against the judgment and decree of the court of Sub Judge, Court No.II, Paonta Sahib, dated 5.6.1995, decreeing the suit of the respondent for possession, was dismissed.

Briefly stated the facts of the case are that the respondent as plaintiff filed a suit for possession in regard to the land comprised in Khasra No. 902/522 min., measuring 2-10 bighas, as detailed in the plaint. The plaintiff alleged that he was entitled to possession of the suit land after redemption of the mortgage

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[1] Whether reporters of Local papers may be allowed to see the judgment? Yes.

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without payment of mortgage money. The plaintiff also alleged that in case the mortgage is not proved, he is entitled to decree for possession on the basis of title. The appellant as defendant pleaded that the plaintiff had sold the suit land to him on 31.5.1966 for a consideration of Rs.700/-, executed a receipt and delivered the possession to the defendant, who is owner in possession of the land in dispute. He took up the plea that in case the sale is not proved, he is in hostile possession of the suit land since the date on which the receipt was executed and as such he has become owner by way of adverse possession.

The suit was tried by the learned Trial Court, which held that the plaintiff has failed to prove that the land was mortgaged by Haria, one of the previous owner, to defendant No.1. It was also held that the defendant has failed to prove that the land was sold to him vide receipt, dated 31.5.1966. However, it was also held that the defendant has failed to prove adverse possession over the suit land. Hence the suit for possession filed by the plaintiff on the basis of the title was decreed.

Those findings of the learned Trial Court were affirmed by the learned First Appellate Court in appeal.

I have heard the learned counsel for the parties and have gone through the record of the case minutely.

The submissions made by the learned counsel for the appellant were that on one hand the courts below have come to the conclusion that the receipt, dated 31.5.1966, Mark-A, has not been proved according to law and it does not confer any title upon the defendant and as such the said receipt was not relied

upon by the courts below. However, on the same evidence, it was submitted that the courts below relying upon the date of receipt have held that the defendant has failed to prove his adverse possession over the suit land and accordingly, the suit for possession was wrongly decreed. It was further submitted by the learned counsel for the appellant that the possession of the defendant became adverse as against the true owner from the date the receipt was executed and his title to the suit property became adverse as against the true owner even in case the said receipt was not proved according to law.

On the other hand, the learned counsel for the respondent submitted that the defendant had to prove from which date his possession became adverse as against the true owner i.e. plaintiff and once the possession of the defendant, admittedly, was permissive on the basis of the alleged sale deed/receipt Mark-A, it had to be specifically proved from which date the title of the defendant became adverse as against the true owner and no presumption can be drawn from which date this title became adverse as against the true owner. Thus, it was submitted that since the origin of possession was permissive, the possession cannot be said to have become adverse as against the true owner and findings of both the courts below are based upon the facts and there cannot be reappraisal of the evidence by this Court.

On the other hand, the learned counsel for the appellant further submitted that the appeal was admitted on substantial question of law which was mainly as to whether Mark-A has been misconstrued, mis-applied and mis-interpreted by the learned First Appellate Court considering the plea of adverse possession taken by the appellant. The learned counsel for the appellant had

relied upon the decision of the Apex Court in **Kochukakkada Aboobacker v. Attah Kasim and others, (1996) 7 Supreme Court Cases 389,** wherein it was observed that the Trial Court and First Appellate Court not considering the relevant documents in proper perspective and the effect of those documents on the right of the parties, it was held that the High Court was entitled to reconsider the evidence by drawing inference from the admitted documents.

It follows from the above discussion that in case there has been misreading of the document receipt Mark-A, dated 31.5.1966, and as to what inference can be drawn from this document, this Court sitting in second appeal can consider the legal question in regard to interpretation of this document and the conclusions that can be drawn on the basis of the said document. Thus, this Court is only to consider the effect of the document Mark-A and as to the inference that can be drawn from this document and no other substantial question of law arises to be considered beyond this document.

A perusal of the judgment of the courts below shows that both the courts below have come to the conclusion that the plaintiff had failed to prove that the suit land was mortgaged in favour of defendant No.1 and those findings have not been assailed by the plaintiff. Both the courts below have also come to this conclusion that the defendant had failed to prove that the receipt Mark-A, dated 31.5.1966, was a sale deed and accordingly, no title had passed to the defendant. However, after the said document was held to be not conferring a title upon the defendant, it was submitted that the courts below have come to a wrong conclusion that the defendant had failed to prove his adverse possession

over the suit land, which was permissive from the date of execution of the document in question, dated 31.5.1966.

To substantiate his submission, as mentioned above that this document was a pointer to the adverse possession of the defendant, which has ripened into ownership, the learned counsel for the appellant had relied upon the following decisions:

The decision in **Mir Iqbal Husain v. Shankar Dayal and others, AIR (29) 1942 Oudh 427** shows that on the facts of the case it was observed as under:

> *"Where the defendant has been in possession of a site in town since 1865 and there is nothing to show that the defendant or his ancestors ever acknowledged the title of the plaintiff zamindar and there is also nothing to show how the defendant came into possession, the defendant must be taken to have acquired title by adverse possession."*

The decision in **Jamal Uddin and another v. Mosque at Mashakganj and others, AIR 1973 Allahabad 328,** shows that:

> *"when in suit for possession the plaintiffs specifically alleged that they had been dispossessed by the defendants before the filing of the suit, the suit would be governed by Article 142 and the residuary Article 144 would have no application. Thus the burden in such a case was on the plaintiffs to prove their possession within twelve years before the suit."*

The decision in **Santa Singh Gopal Singh and others v. Rajinder Singh Bur Singh and others, AIR 1965 Punjab 415,** shows that following observations were made in para 7 of the judgment, which are relevant and are being reproduced below:

> *"Where in a suit for possession of agricultural land brought in 1959 the pleadings of the parties left no room for doubt that the suit was based on allegation of title as also prior*

> *possession in the year 1944 and dispossession and discontinuance of possession subsequently, the suit is governed by Art.142 and not by Art.144, Limitation Act, 1908."*

On the other hand, the learned counsel for the respondent had relied upon the decision in **Achal Reddi v. Ramakrishna Reddiar and others, AIR 1990 Supreme Court 553,** in which it was observed as under:

> *"In the case of an agreement of sale the party who obtains possession, acknowledges title of the vendor even though the agreement of sale may be invalid. It is an acknowledgment and recognition of the title of the vendor which excludes the theory of adverse possession. The well-settled rule of law is that if a person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though he claims under another title having regard to the well-recognized policy of law that possession is never considered adverse if it is referable to a lawful title."*

The above decision applies to the present facts and the decisions of the cases cited by the learned counsel for the appellant do not apply to the present facts.

It is true that there is evidence that the defendant is in possession of the suit land for the last about 25 years. It is also clear that the origin of the possession of the defendant was the date of execution of the receipt, dated 31.5.1966, as set up by the defendant, who set up his title on the basis of the said receipt. Thus, his possession over the suit land was permissive and not adverse as now claimed by him. In case he claims that his possession was permissive and it had become adverse on subsequent date, the defendant had to prove as to from which date his possession became adverse as against the true owner i.e. plaintiff and from which date he acquired the adverse title to the suit land. There was no specific pleadings of the defendant in this regard as to when

permissive possession became adverse as against the true owner and his pleadings, in the alternative, are that the defendant has become owner by way of adverse possession. Thus, the possession of the defendant was not alleged or proved to be adverse and from which date and once defendant had failed to prove his adverse possession over the suit land, the plaintiff was not required to file the suit within a period of 12 years from the date of dispossession and the suit could be filed by the plaintiff based on title under Article 65 of the Limitation Act and as such the suit was well within time and both the courts below had rightly granted the relief of possession in favour of the respondent, which findings do not call for an interference by this Court. Therefore, there is no merit in the appeal filed by the appellant, which is dismissed accordingly. The parties are left to bear their own costs.

December 17, 2007. **(V.K. Ahuja), J.**
(TILAK)